IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 710 of 1991

For Approval and Signature:

HON'BLE MR.JUSTICE J.R.VORA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

STASTE OF GUJARAT

Versus

MANGALBHAI MORRABHAI PARMAR

Appearance:

MR AJ DESAI, APP for Appellant - State

MR KIRIT I PATEL for Respondent No. 1-2

CORAM : HON'BLE MR.JUSTICE J.R.VORA

Date of decision: 19/02/2004

ORAL JUDGEMENT

1. This Appeal is preferred by the State being aggrieved with the judgment and order of learned Judicial Magistrate, First Class, Baroda, in Criminal Case

No.1376/81, delivered on 18.7.91, acquitting respondents original accused Nos. 1 and 2 for the charges under Section 223, 224 and 114 of the Indian Penal Code.

2. One more accused of the said Criminal Case accused No.3 Ramesh @ Versi Jesing Rajput, was convicted by the learned Magistrate for the charges framed against him under Sections 223, 224 and 114 of the IPC. The conviction of original accused No.3 is not subject matter of this Appeal, but he had preferred one Criminal Revision Application No.1144-A/1991 against confirmation of his conviction awarded by the learned Magistrate and confirmed by learned Sessions Judge. The said Criminal Revision application was disposed of as withdrawn vide order of this Court dated 18.7.2002 because accused No.3 petitioner of the Criminal Revision Application had died and hence said Revision Application came to be withdrawn by learned Advocate for the petitioner.

3. However, in this Criminal Appeal No.710 of 1991, out of two respondents, respondent No.2 Mangaldas Maganbhai Makwana - original accused No.2 had expired on 6.2.1996 and, therefore, Appeal against him was abated by order of this Court passed on 3.4.2002. So, now, this Appeal is against remaining respondent No.1 - original accused No.1 Mangalbhai Morarbhai Parmar.

4. The facts disclose that on 28.7.1981 accused No.3, Ramesh @ Versi Jesing Rajput was undergoing imprisonment on conviction at Sabarmati Central Jail and was to be produced before the court at Karjan in a pending trial. On so informing by the concerned court, after due procedure, original accused Nos.1 and 2, being Police Constables, were deputed to escort and produce accused No.3 Ramesh @ Versi Jesing Rajput at the court at Karjan and restore him to Sabarmati Jail. The custody of accused No.3 was taken by accused Nos. 1 and 2 from jail and they boarded train from Ahmedabad but as the said train had no stop at Karjan, all the three accused got down at Baroda Railway Station. Before that, accused No.3 had been to natural call and, therefore handcuffs were removed from his hand. Thereafter, all the three accused were sitting on a bench on the Railway Station Platform at Baroda and in the meantime, as per the prosecution case, three accused came out of station at about 1.00 a.m. At Samrat Hotel all the three accused had tea and had pan and cigarettes from galla. While accused Nos. 1 and 2 Police Constables were lighting their cigarettes, accused No.3 ran away from the custody of accused Nos. 1 and 2. Intensive search was made but accused No.3 could not be apprehended who was apprehended

after some days. Accused Nos. 1 and 2 therefore went to Sayajiganj Police Station at Baroda and according to instructions received from Sayajiganj Police Station, Baroda, they approached Railway Police Station at Baroda and a complaint came to be recorded about escaping of accused No.3 who was according to the prosecution case was hardened criminal.

5. On charge sheet being filed against the three accused for the above said offences by Sayajiganj Police Station because the complaint was forwarded ultimately to the Sayajiganj Police Station by Railway Police Station at Baroda, plea was recorded by the learned Magistrate vide Exh.5 on 19.11.1981, to which all the accused pleaded not guilty, but accused Nos. 1 and 2 while admitting the incident of escaping accused No.3 from their custody, further stated in their further statements under Section 313 of Criminal Procedure Code that accused No.3 was hardened criminal and in many cases he was convicted and was undergoing sentences of imprisonment at Sabarmati Central Jail. According to the case of accused Nos. 1 and 2, they made complaint before their superiors and also requested for strict escort, special vehicle, etc. but the same was not provided to accused Nos. 1 and 2. They also stated that due to crowd at Baroda Railway Station Platform though the accused No.3 was handcuffed, he ran away and due to crowd, no rifle could be used by any of accused No. 1 and 2. They stated that there was no negligence on the part of accused Nos. 1 and 2.

6. Learned Magistrate examined as many as 20 witnesses offered by the prosecution and also appreciated the documents placed on record. After hearing both the sides, vide judgment and order impugned in this Appeal, learned Magistrate acquitted accused No.1 Mangalbhai Morarbhai Parmar and accused No.2 Mangaldas Maganbhai Makwana for the charges levelled against them under Sections 223, 224 and 114 of IPC and hence this Appeal by the State.

7. This State Appeal against acquittal remains for respondent No.1 only, as above said. Learned APP Mr. A.J. Desai for the State - appellant and learned Advocate Mr. K.I. Patel for respondent No.1 were heard at length. Mr. Desai stated that the incident in question is admitted by both the accused Nos. 1 and 2. At the relevant juncture, as per the deposition of witness Virsinghbhai Bhaljibhai, the accused No.3 was not properly handcuffed. Without handcuff accused No.3 was taken out of the platform by accused Nos. 1 and 2 which

is evident from the deposition of PW-18 Exh.72 Laxmansinh Nansinh and, therefore, when the incident is admitted by accused Nos. 1 and 2, the rest of the charge is proved by the prosecution through these witnesses. Learned Magistrate ought to have appreciated that though the case rests on circumstantial evidence, the chain was completely proved by the prosecution. It was urged that after allowing the Appeal, respondent No.1 be convicted for the charges levelled against him. While on the other hand, Mr. Patel urged that though the incident is admitted by accused Nos. 1 and 2 in their further statements, prosecution has failed to prove negligence on the part of accused Nos. 1 and 2. The deposition of prosecution witness No.8 Exh. 37 Virsinghbhai Bhaljibhai and prosecution witness No.18 Exh. 72 Laxmansinh Nansinh is properly appreciated by the Trial Court and from that evidence and from the evidence of PW-11 Exh.55 Rahulkumar Somabhai who was Jailor at relevant time, the Trail Court came to the right conclusion that there was no negligence on the part of accused Nos. 1 and 2 in the incident of escaping accused No.3 from their custody. Ultimately, it was urged that the Appeal be dismissed.

8. Present respondent No.1 was acquitted for the charges levelled against him under Sections 223, 224 and read with Section 114 of the IPC. Essential of Section 223 of the IPC is, when any person is lawfully committed to the custody of a public servant, and said public servant negligently suffers such person to escape from the confinement, such public servant shall be punished under Section 223 of IPC. While essential of Section 224 of the IPC is escaped by the convict or attempted to escape by him from any custody in which he is lawfully detained. In these circumstances, Section 224 of IPC is attracted. On going through the record, it appears that the prosecution lodged case against all the three accused. Firstly, it was alleged that due to negligence of accused Nos. 1 and 2, accused No.3 escaped from their custody. This covers charges under Section 223 of IPC while it is also alleged that accused Nos. 1 and 2 have intentionally abated escape of accused No.3 from their custody. These allegations are alternative and at the same time contrary to each other and affects accused Nos. 1 and 2 to the extent that they abetted the wilful escape by accused No.3. So they were charged for offence under Section 224 with the aid of Section 114 of IPC along with accused No.3. If the allegations against accused Nos. 1 and 2 under Section 223 of IPC about the negligence in duty is proved, then the question of abeting by them intentionally to the escape of accused No.3 would not arise at all. When act is intentional it is not

negligent. Either the act is intentional or negligent. On going through the evidence of witnesses and the documents on record, this court does not find an iota of evidence against respondent No.1 to the effect that accused Nos. 1 and 2 intentionally abated the escape of accused No.3 and, therefore, were liable for the punishment under Section 224 read with Section 114 of the IPC. The Trial Court therefore has rightly acquitted the respondent No.1 from the charges under Section 224 read with Section 114 of the IPC.

9. So far as charges levelled against respondent No.1 under Section 223 of the IPC is concerned, negligence on the part of the accused is sole element which is required to be proved by the prosecution. Negligence necessarily suggests that with reference to context it is a conclusion or inference drawn from the proved facts through evidence. What is required to be proved by the prosecution in this case is "the absence of care according to the circumstances." In wider sense Negligence is an omission to do something, which by law a reasonable man, guided upon those considerations which ordinarily regulate the conduct of human affairs do, or doing something which a prudent and reasonable man would not do. In criminal trials, it is always imperative for the prosecution to prove a case against the accused beyond reasonable doubt and by positive evidence and, therefore, in the present appeal, the evidence recorded by the Trail Court is required to be re-appreciated to ascertain whether any positive evidence is available on record as adduced by the prosecution to establish the guilt of the respondent No.2 about his being negligent in the escape of accused No.3 from his lawful custody. In this respect, when the statute makes it very clear that when a public servant when negligently suffers convict to escape from confinement in those circumstances only the Section 223 is attracted, it is the bounden duty of the prosecution to prove its case beyond reasonable doubt and by positive creditworthy evidence that accused Nos. 1 and 2 were in the circumstances required to do certain act, were required to take certain precaution, failed to perform certain act or failed to take required precautions.

10. When this Court re-appreciates the evidence of the witnesses produced by the prosecution and the documentary evidence, it clearly appears that there is no eye witness of the incident who might have seen accused No.3 escaping from the custody of accused Nos. 1 and 2. The material witnesses therefore whose evidence is required to be re-appreciated along with the other

witnesses are PW-8 Virsinghbhai Bhaljibhai Exh.37, PW-18 Laxmansinh Nansinh Exh.72 and PW-11 Rahulkumar Somabhai Exh.55, who was Jail Superintendent at Sabarmati Jail at the relevant juncture.

11. PW-8 Exh.37 Virsinghbhai Bhaljibhai deposed that at relevant time his duty as Head Constable was from 28.7.81, 8.00 a.m. to 29.7.81, 8.00 a.m. as general in-charge on the platform of Railway Station at Baroda. Police Constable Laxmansinh Nansingh and Police Constable Somabhai were also with him. Police Constable Laxmansinh is examined by the prosecution as PW-18 Exh.72. PW-8 Virsinghbhai Bhaljibhai further stated that while they were on platform No.1, two Police Constables and third person in private clothes were sitting on a bench. The third person, who was not Police Constable, was sitting between two Police Constables. He identified accuses Nos. 1 and 2 as police personnel and accused No.3 as a third person in private clothes. According to his deposition, he inquired from accused Nos. 1 and 2 that where they were to go. Accused Nos. 1 and 2 replied that they were on way to Miyagam - Karjan. It was also inquired by the witness from the Police Constables that the person who was sitting in between them was an accused. The witness further stated that the accused was not handcuffed but there was handkerchief on his hand, and what was below the handkerchief, could not be seen by him. According to his deposition, he advised accused Nos. 1 and 2 to handcuff accused No.2, and also advised that it was dangerous to keep accused without handcuff. According to his deposition both the accused Nos. 1 and 2 replied that the accused was not of the kind, who would escape. While PW-18 Exh.72 Laxmansinh Nansingh deposed that on 28.7.1981 to 29.7.1981, 8.00 a.m. he was at Musapharkhana at Ahmedabad, Police Constable Virsinghbhai who is examined at Exh. 37 and Police Constable Somabhai were with him. On 29.7.1981, at about 01.00 a.m. while along with witness Virsingbhai he was passing near Musapharkhan, he noticed two Police Constables and one accused coming out of Railway Station. He identified all the three as accused Nos. 1, 2 and 3. Thereafter, present respondent No.1 at about 2.00 A.M. came to Railway Police Station for recording of the complaint for the escape of accused No.3. He also confirmed that before all the three accused came out of Railway Station, all the three accused were sitting on a bench at the Railway Platform and accused No.3 was sitting in between accused Nos. 1 and 2. There was handkerchief on the hands of accused No.3, but he positively noticed that the accused No.3 was not tied down with the rope. While PW-11 Exh. 55 Rahulkumar Somabhai, being Jail

Superintendent of Sabarmati Central Jail at Ahmedabad deposed that on 28.7.1981 at about 17.00 hours, he entrusted accused No.3, who was convicted prisoner in Ahmedabad Sabarmati Jail, to the custody of accused Nos. 1 and 2. In his cross-examination, he admitted that the Police bandobast for deputing accused No.3 to Karjan, was to be provided by Police Headquarters at Shahibaug. He informed Police Headquarters at Shahibaug that accused No.3 was hardened criminal and therefore it was hazardous to send accused No.3 through bus or train. He also admitted that such convict prisoners are sent out of jail with strict police bandobust. He defines strict police bandobust to be more police personnel and special vehicle and necessary armoury and instruments to be given to police personnel.

12. While re-appreciating the evidence of the above three witnesses, it becomes clear that the prosecution failed to prove through positive evidence beyond reasonable doubt the case against respondent No.1 so far as the negligence of respondent No.1 is concerned. There is no evidence that the acts which were necessary in the circumstances to perform, were not performed by accused Nos. 1 and 2. It is also not proved that the precautions which were required to be taken were not taken by accused Nos. 1 and 2. When in this respect the evidence of Virsinghbhai Exh. 37 and Laxmansinh Nansinh Exh.72 is taken into consideration, none of the witness could depose with certainty that accused No.3 was without handcuff. It is necessary to note here that it is the prosecution case that Virsinghbhai and Laxmanbhai and third constable Somabhai were together when they noticed three accused sitting on the bench. None of these two witnesses examined out of three available witnesses, deposed any positive fact by which negligence on the part of accused Nos. 1 and 2 can be inferred. On the contrary, it has come in the evidence that the accused No.3 was sitting between accused Nos.1 and 2. There are contradictions in the depositions of these two witnesses. PW-18 Exh. 72 Laxmansinh deposed that at one 1.00 a.m. he saw all the three accused coming out of Ahmedabad Railway Station because his duty was at Musapherkhana at Ahmedabad. While PW-8 Exh. 37 Virsinghbhai though stated positively that Laxmansinh Nansingh was with him when he noticed all the three accused were sitting on a bench but that was at the platform No.1 of Railway Station at Baroda. It is proved in cross-examination that the statement of witness Virsinghbhai before the court about advising accused Nos. 1 and 2 not to keep the accused without handcuffs, was an improvement and had not been stated by him in his statement before the

Police. From the evidence of these two witnesses, by no stretch of reasoning, it can be deduced that the accused No.3 escaped because accused Nos.1 and 2 were negligent in keeping due vigilance as to the custody of accused No.3. While Exh. 55 PW-11 Rahulkuamr Somabhai admitted that accused No.3 was hardened criminal and strict bandobust like more police personnel and special vehicle and special arrangements was required. He also admitted that he advised the Police Head Quarter at Shahibaug accordingly but Shahibaugh Police Headquarter deputed accused Nos. 1 and 2 only to escort accused No.3 to Miyagam - Karjan. When there is no positive proof of the negligence on the part of accused Nos. 1 and 2, as to what were the circumstances from which it can be deduced that accused Nos. 1 and 2 omitted to take precautions which they were required to take, the defence of the accused Nos. 1 and 2 is more probable and which they have pleaded in further statement under Section 313 of the Criminal Procedure Code to the effect that due to crowd of travellers at Platform No.1 at Baroda Railway Station, the accused escaped with handcuffs and since there were many persons on the platform, coercive method of opening fire by rifle could not be resorted to. This fact is confirmed by the evidence of prosecution that when accused No.3 was apprehended by Police, he was apprehended with handcuffs. It is also on record that the accused No.3 had tendency to escape from the police custody and he was earlier also escaped from the police custody.

13. In the above view of the matter when the above appreciation of evidence, the Trial Court has come to the conclusion that no case is proved against accused Nos. 1 and 2 beyond reasonable doubt, this court is not inclined to interfere in the order of acquittal because the appreciation by the Trial Court of the evidence is proper, does not suffer from any flaw, and the conclusion arrived at by the Trial Court is based on the facts on the record. It is known principle that in acquittal appeal on re-appreciation even if the second view is possible, the view taken by the Trial Court cannot be lightly interfered with.

14. For the above said reasons, the Appeal filed by the State against the acquittal stands dismissed as against respondent No.1.

(J.R. Vora, J.)

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